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Supreme Court of the United States.

PAUL J. MAHONEY, d.b.a. MAHONEY'S ROCKY LEDGE FARM & NURSERY, *Petitioner,*

v.

JAMES D. HODGSON, SECRETARY OF LABOR, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States,

Paul J. Mahoney, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the First Circuit entered in the above-entitled case on June 5, 1972.

Opinions Below.

The opinion of the Court of Appeals for the First Circuit is reported at 460 F. 2d 326 and is printed in Appendix A hereto, *infra,* pages 13-16. The November 30, 1971, order on plaintiff's motion that defendant be held in contempt is printed in Appendix A hereto, *infra,* page 19. The January 14, 1972, order imposing further sanctions and on defendant's application for stay is printed in Appendix A hereto, *infra,* pages 21-22.

The partial judgment of January 14, 1972, is printed in Appendix A hereto, *infra,* pages 23-24.

The memorandum and order on petition for rehearing of June 22, 1972, is printed in Appendix A hereto, *infra*, page 17.

Jurisdiction.

The opinion of the Court of Appeals for the First Circuit (Appendix A, pages 13-16) was entered on June 5, 1972. A timely petition for rehearing was denied on June 22, 1972.

The jurisdiction of the Court is invoked for the following reasons:

The Court of Appeals has rendered a decision in conflict with the decisions of other Courts of Appeals on the same matter.

The Court of Appeals has decided an important question of federal law which has not been, but should be, settled by the Supreme Court.

The Court of Appeals has so far sanctioned such a departure by a lower court as to call for an exercise of the Supreme Court's power of supervision.

Questions Presented.

1. Is Fifth Amendment due process violated by entering a default judgment and ordering incarceration while hearing an application for a stay of a contempt order after a notice of appeal has been filed?

2. Is a contempt order to pay a fine to the United States Treasurer so manifestly unappealable as to justify its disregard by a further order of a judgment by default and incarceration while hearing an application for a stay of the order?

3. What process is due and must be accorded a contemnor prior to the imposition of contempt judgment,

default judgment, and incarceration under Rule 37 of the Federal Rules of Civil Procedure?

4. Is it violative of due process to award attorney's fees to the United States Government as a sanction when attorney's fees cannot be awarded against the United States Government as a sanction?

Statutes Involved.

Rule 33 (c) F.R.C.P.
Rule 37 (a) (b) (f) F.R.C.P.
These are set out in Appendix A, *infra*, pages 24-27.

Statement of the Case.

Under Section 17 of the Fair Labor Standards Act, the plaintiff sought to enjoin alleged minimum wage and overtime violations of approximately 550 employees. The defendant, who operates a farm and nursery business, sought to ascertain the names of the employees in order to plead the appropriate exemptions. The plaintiff filed interrogatories asking the defendant in effect to reproduce his weekly payroll for a two-year period, including a five-month period barred by the civil statute of limitations for nonwilful violations. The defendant filed objections claiming the Fifth Amendment privilege and undue burden of preparing the plaintiff's case, because the plaintiff had, during its investigation, been furnished with the records to reproduce at its own office.

On June 25, 1971, the District Court, not acting under a motion to compel answers as required by Rule 37 (a) of the Federal Rules of Civil Procedure, ordered the defendant to answer within 20 days or produce the records under Rule 33 (c). At the same time the court denied the de-

fendant's motion to compel answers to his interrogatories seeking names of those employees alleged to be underpaid, in order that he might prepare his defense.

On November 30, 1971, the first hearing of counsel was held. The defendant, not having been ordered to appear to show cause, was not present. The original contempt judgment was rendered at this time, along with a one hundred dollar per day fine and the award of attorney's fees to the United States Government.

On January 6, 1972, the defendant filed in the District Court an appeal and an application for a stay of judgment. On January 14, 1972, the court after hearing denied the stay and entered a default judgment, ordered payment of thirty-eight hundred dollars and the committal of the defendant on January 24, 1972, if the books and records were not produced.

On January 17, 1972, the defendant filed an appeal of the judgment of January 14, 1972. The Court of Appeals denied an application for stay of judgment; therefore, the defendant produced the books in question.

Reasons for Granting this Writ.

1. We are here concerned with the interpretation to be accorded to Rule 37 of the Federal Rules of Civil Procedure and the constitutional doctrine underlying the rule. The case of *Societe Internationale* v. *Rogers,* 357 U.S. 197 (1958), left open the question whether Fifth Amendment due process was violated by striking a complaint because of a plaintiff's inability, despite good faith efforts, to comply with a pretrial production order. It did determine that Rule 37 should not be construed to authorize dismissal of a complaint when noncompliance was due to inability and not to wilfullness, bad faith or any fault of petitioner.

In the case at bar the failure to comply with the November 30th order at the time when the judgment by default

and incarceration were ordered was due to petitioner's good faith belief that his payment of a 250 dollar cash bond and his filing of an appeal and an application for a stay of judgment entitled him to a review of the order in the Court of Appeals.

Unless the act of filing an appeal and an application for a stay of judgment is contumacious conduct performed with wilfull bad faith, this judgment by default must be reviewed.

In *Hovey* v. *Elliot*, 167 U.S. 409 (1897), due process was violated when an adverse judgment was rendered against a party solely for punishing him for contempt without affording him a day in court.

The case of *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322 (1909), held that when a defendant has suppressed or failed to produce relevant evidence in his possession which he has been ordered to produce, a presumption arises as to the bad faith and untruth of his answer which justifies striking it from the record and rendering judgment as though by default.

The distinction is made between entering an adverse judgment as mere punishment and the entry of such a judgment under statutory authority allowing such procedure for disobedience of an order for the production of evidence.

The Fifth Circuit appears to be in sharp disagreement with the First Circuit as to when a judgment by default should be applied.

The entry of judgment by default is a drastic remedy and should be resorted to only in extreme situations. It is only appropriate where there has been a clear record of delay or contumacious conduct. *Pond* v. *Braniff Airways, Inc.*, 453 F. 2d 347 (5th Cir. 1972); *Flaska* v. *Little River Marine Construction Co.*, 389 F. 2d 885 (5th Cir. 1968); *Hutton & Company* v. *Moffatt*, 460 F. 2d 284 (5th Cir. 1972); *Dorsey* v. *Academy Moving & Storage Inc.*, 423 F. 2d 858 (5th Cir. 1970).

The Second Circuit likewise would not seem to be in agreement with the First Circuit. *Independent Productions Corp.* v. *Loew's Inc.*, 283 F. 2d 730 (2d Cir. 1960).

> "[T]he purpose of exercising injunctive power under Section 17 is to insure compliance, not to punish. Issuance of an injunction relegates a citizen to a state of embarrassment and taints him with the stigma of unlawful conduct, as well as subjecting him to possible contempt proceedings. Such drastic measures should be applied only when required to insure compliance, and not under circumstances where citizens have acted in good faith in contesting the contentions of the government, and have voluntarily agreed to comply with lawful provisions of the Act as determined by the Court." *Wirtz* v. *Kneece*, 249 F. Supp. 564, at 571 (1966).

2. A contempt order to pay a fine to the United States Treasurer and pay attorney's fees to the Government is inherently incapable of being obviously civil in character and, therefore, manifestly unappealable.

The plethora of litigation to determine the character of contempt orders would seem to indicate that any contempt order lacks the essential quality of manifest unappealability. Being sui generis in nature, any order must be tested by the purpose for which it was rendered.

In the case at bar the lower court indicated its order of November 30th was made to vindicate its authority and to punish the petitioner for his bad faith.

> "If this refusal persists, the Court will entertain and consider on its own motion further sanctions. I feel that the defendant has not acted in good faith in this matter, and that is the reason for the Court's order, and that concludes this hearing."

There is no mathematical formula which can be applied as an unvarying gauge to all cases to determine whether the punishment is remedial and for the benefit of the complainant or whether it is punitive and in the public interest to vindicate the authority of the court and to deter other like derelictions.

As was said in *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 441 (1911),

> "Contempts are neither wholly civil nor altogether criminal . . . it may not always be easy to classify a particular act as belonging to either one of these two classes. It may partake of the characteristics of both . . . . It is not the fact of punishment but rather its character and purpose that often serve to distinguish between the two classes of cases."

The facts in the case at bar indicate that even if the punishment imposed was not wholly punitive, it was partly so, and thus the punitive feature must be regarded as dominant and fixing the character of the contempt. *Matter of Christiansen Engineering Co.*, 194 U.S. 458; *Union Tool Co.* v. *Wilson*, 259 U.S. 107 (1921); *In re Merchants Stock & Grain Co. Petitioner*, 223 U.S. 639 (1912).

The fine payable to the United States was clearly not an order to reimburse an injured party. The case of *Fox* v. *Capital Co.*, 299 U.S. 105 (1936), relied upon by the Court of Appeals to substantiate the obvious nonappealable civil character of the order, indicates that if the fine in all its parts had not been made in a genuine endeavor to reimburse an obstructed creditor, a different result might have been reached. "It retained from first to last its unitary quality. In levying the fine, the court was not acting sua sponte, or at the instance of the government through a prosecuting officer . . . . It lent a helping hand to a suppliant for aid." *Supra*, at 109.

That an order merely directing the parties to hurry up and take depositions and submit briefs, *Manuel San Juan Co.* v. *American Underwriters Corp.*, 331 F. Supp. 1050 (D.P.R. 1971), should be authority for the Court of Appeals' determination of the manifest unappealability of a contempt judgment suggests a review of judgment.

The language of the court in *Ruby* v. *Secretary of the United States Navy*, 365 F. 2d 385, 389 (9th Cir. 1966), cert. denied, 386 U.S. 1011 (1967), indicates one must make haste slowly when deciding an order is so manifestly deficient that it may be summarily disregarded. How much more so this should be when the maker of the order was the sole arbiter of its obvious unappealability!

The persuasion of 9 Moore's Federal Practice (2d ed.) § 203.11, at 736-739, cited by the Court of Appeals, seems to demand a decision by this Court of how unappealable is obvious unappealability and how deficient is manifest deficiency.

In the Fourth Circuit Judge Haynsworth had no such problems with the shades of appealability. He believes a contempt order is immediately appealable, but is too harsh a method to obtain review of a production order, so the Secretary of Labor was allowed a writ of mandamus to review a notice to show cause. The petitioner in the case at bar was never even cited to show cause so that he could have sought review by mandamus. In view of the decision by Judge Haynsworth in *United States* v. *Hemphill*, 368 F. 2d 539 (4th Cir. 1966) it is doubtful if the petitioner would have been defaulted and ordered confined while pursuing an appeal in good faith.

In the Sixth Circuit the taking of an appeal, even though from an interlocutory nonappealable order, nevertheless transferred jurisdiction to the Court of Appeals and orders thereafter entered by the district court were void. *Keohane* v. *Swarco, Inc.*, 320 F. 2d 429 (6th Cir. 1963).

The Fifth Circuit and the Seventh Circuit are not in accord with the First Circuit regarding the power of the district court to act once an appeal is taken. *Turner* v. *HMH Publishing Co.*, 328 F. 2d 136 (5th Cir. 1964); *In re Federal Facilities Realty Trust*, 227 F. 2d 651 (7th Cir. 1955); *Elgen Manufacturing Corporation* v. *Ventfabrics Inc.*, 314 F. 2d 440 (7th Cir. 1963).

3. What process is due and must be accorded a contemnor prior to the imposition of contempt judgment, default judgment, and confinement under Rule 37 of the Federal Rules of Civil Procedure?

Rule 37 deals with the consequences of failure to make discovery. Where the discovery procedure is one set in motion by the parties themselves without court order, the party seeking discovery must first obtain an order under Rule 37 (a) requiring the other party to make the discovery sought. It is only violation of this order which is punishable under Rule 37 (b). *Wembley, Inc.* v. *Diplomat Tie Company*, 216 F. Supp. 565 (1963).

Complete adherence to the clearly delineated procedures of Rule 37 is required. *Independent Productions Corp.* v. *Loew's Inc.*, 283 F. 2d 730 (1960).

The Rule 37 (b) (2) sanctions provided for refusal or failure to answer Rule 33 interrogatories may be imposed only when a party refuses to obey an order made under subdivision (a) requiring him to answer designated questions. *Halverson* v. *Campbell Soup*, 374 F. 2d 810 (1967).

A failure to move under Rule 37 (a) to compel further answers was the basis for denial of a motion for a preclusion order respecting answers allegedly evasive and incomplete. *Commonwealth Edison Co.* v. *Allis Chalmers Mfg. Co.*, 40 F.R.D. 96, at 108 (1966).

Although the plaintiff moved to hold the defendant in contempt under Rule 37 (b) (1), the court applied sanctions under Rule 37 (b) (2). The specific requirement of notice

of motion would be meaningless if the court can make an order authorized under a provision not applicable. The award of expenses is not applicable to Rule 37 (b) (1).

It is clearly inappropriate for the court to impose sanctions far apart from the provisions of Rule 37 which specifically prescribe what and when sanctions are justified. So important a mechanism as discovery should rest upon a coherent and integrated foundation of enforcing power.

Interrogatories should not be used to determine the contents and effect of documents which are available to the interrogator.

> "[I]t is unreasonable to ask a defendant to perform entire, extensive accounting and auditing operations of his own books and records in order that he may prepare and present to the plaintiff, in tabulated form, or in other convenient form, every minute detail upon which the plaintiff may base his recovery of damages. That it would be burdensome, vexatious, and onerous cannot be doubted. Auditing and accounting are expensive and time consuming operations and the Government has provided funds and agents to perform these operations whenever necessary; it is neither reasonable nor proper to expect the defendant to perform such services for the sole benefit of the prosecuting agency and at his own cost, to his own consequent damage." *Porter* v. *Montaldo's*, 71 F. Supp. 372, 375.

The scope of Rule 33 should not be extended to accomplish this end. *Porter* v. *Central Chevrolet*, 7 F.R.D. 86.

Rule 33 (c) should not be used as a Rule 34 order for production of documents. It contains the express limitation that it applies only when the burden of ascertaining the information is substantially the same for both parties.

The Court of Appeals has so far sanctioned such a departure from the clearly delineated mandate of Rule 37 of

the Federal Rules of Civil Procedure that this Court's power of supervision is called upon.

Does the power to render a default judgment because of noncompliance with a production order depend exclusively upon Rule 37 of this Court stated in *Societe Internationale* v. *Rogers*, 357 U.S. 197, at 207, and as the rationale of the 1970 amendment of the rule indicates, or does the power vary according to a court's conception of what it is?

4. Is it violative of due process to award attorney's fees to the United States Government as a sanction when attorney's fees cannot be awarded against the United States Government as a sanction?

Because Rule 37 (f) does not permit as a sanction against the Government the award of attorney's fees, an award of such fees on behalf of the Government against the defendant discriminates against the defendant. The defendant has not entered the Court upon equal terms with the Government. They do not stand equal before the law. *Gulf, Colorado & Santa Fe Ry.* v. *Ellis*, 165 U.S. 150.

The award of such fees to the Government deprives the defendant of property without due process of law in that it singles him out of all litigants and requires him to pay to another litigant fees while it gives him no like corresponding benefit. The award singles him out and punishes him when for like matters it punishes no others. He has lost, so he must pay. Had he won, he could not be paid.

It is no sufficient answer to say he is punished only when adjudged to be wrong. He does not enter the courts upon equal terms with the Government. He must pay when wrong. He cannot recover if right. The Government recovers if right, and pays nothing if wrong. Therefore, in such a suit as in the case at bar to which he is a party with the Government, he is discriminated against and not treated

as other litigants not involved in litigation with the Government.

He and the Government do not stand equal before the law. It is true the amount is small, but smallness does not determine the question of right.

The arbitrary selection penalizing litigants who oppose the Government can never be justified by calling it classification. Were it so, the protecting clauses of the Fifth Amendment would be a mere rope of sand. It must not be forgotten that one of the chief purposes of the Magna Charta provisions was to prohibit the king from selling justice by imposing fees on litigants through his courts.

Our Government would not long be free if the right of equality before the law were not held sacred.

Conclusion.

For the foregoing reasons, it is respectfully submitted that a review be granted.

MARGARET C. MAHONEY,
Counsel for Petitioner.

Appendix A.

United States Court of Appeals for the First Circuit.

No. 72-1020

JAMES D. HODGSON, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
PLAINTIFF, APPELLEE,

v.

PAUL J. MAHONEY, d/b/a MAHONEY'S ROCKY
LEDGE FARM AND NURSERY,
DEFENDANT, APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*.

Margaret C. Mahoney for appellant.
Jay S. Berke, Attorney, with whom *Richard F. Schubert*, Solicitor of Labor, *Carin Ann Clauss*, Assistant Solicitor, *Donald S. Shire*, Attorney, and *Albert H. Ross*, Regional Solicitor, were on brief, for appellee.

June 5, 1972

PER CURIAM. The appellant, defending an action brought by the Secretary of Labor to enjoin violations of § 15 of the Fair Labor Standards Act, 29 U.S.C. § 215, refused to comply with a court order entered June 25, 1971, directing him to either answer interrogatories or afford the Secretary an opportunity to examine his payroll records to obtain the information sought by the interrogatories. On November 30, 1971, upon the Secretary's motion and to compel compliance, the court held appellant in civil contempt and ordered him to pay $100 for each day of continued noncompliance. In addition, the Secretary was awarded the expenses, including attorney's fees, incurred in obtaining the contempt order. In the face of appellant's continued noncompliance, on December 27 the Secretary moved for additional sanctions. On January 6, 1972, appellant filed a notice of appeal from the court's November 30 order. On January 14, the court ordered that the $3800 accrued under the prior order be paid forthwith and imposed the additional sanction of incarceration for continued noncompliance. It also granted a default "partial" judgment enjoining the appellant from violating the Fair Labor Standards Act. On appeal from this judgment appellant's attack is leveled at the two contempt orders as well as the underlying discovery order. A number of contentions are raised, we respond to all but the most frivolous and affirm.

The June 25 discovery order was a proper exercise of judicial power under Rule 37(a), Fed. R. Civ. P. The contention that it was burdensome ignores the fact that records are required to be kept, partly at least, for just such a purpose as the Secretary had, that the identical records had earlier been voluntarily turned over, and that the order specifically allowed turnover as a substitute for computation. Nor does the absence of a formal motion by the Sec-

retary nullify the court's order. Appellant filed objections to the Secretary's interrogatories, filed his own interrogatories seeking the same information from the Secretary which the latter sought from him, and moved under Rule 37(a) to compel the Secretary to answer these interrogatories. The issue was joined, the Secretary also calling on the court for assistance. In these circumstances the appellant can claim no surprise by the court's order, and we can find no reason to elevate a technical omission to the level of a jurisdictional defect.

Nor did the June 25 order violate appellant's fifth amendment privilege against self-incrimination. The records were sought as part of a civil suit for a period well within the statute of limitations for wilful violations, 29 U.S.C. § 255. Moreover, the payroll records sought are required to be kept and preserved in order to effectuate governmental regulation. 29 U.S.C. § 211. Consequently they have "public aspects" and do not invoke the protection of the fifth amendment. *See Shapiro* v. *United States,* 335 U.S. 1, 32-36 (1948).

The November 30 contempt order was authorized by Rule 37(b) (2), Fed. R. Civ. P., to induce compliance with the June 25 discovery order. Since appellant could avoid its effect by compliance, the contempt was clearly civil in nature. Procedural requirements were fulfilled by providing appellant with notice and an opportunity to be heard, and appellant's attorney did in fact appear and oppose the order. There is no requirement that the party himself be physically present. The award of attorney's fees to the Secretary is authorized by Rule 37(b), and appellant can claim no constitutional violation on the ground that he could not have recovered attorney's fees against the Secretary. Rule 37(f) and 28 U.S.C. § 2412, which limit assessment of fees and costs against the United States, carry out the common law rule that a sovereign is liable for costs

only to the extent specifically provided. It is not to be overlooked that, win or lose, the government bears all the expenses of maintaining the courts.

The January 14 order was entered after appellant had filed a notice of appeal from the November 30 order. While filing a notice of appeal generally deprives the district court of jurisdiction, where the notice is manifestly deficient, e.g. by reason of reference to a nonappealable order, the district court may disregard it and proceed with the case. *Ruby* v. *Secretary of the United States Navy*, 365 F.2d 385, 389 (9th Cir. 1966), *cert. denied*, 386 U.S. 1011 (1967); *Manuel San Juan Co.* v. *American International Underwriters Corp.*, 331 F.Supp. 1050, 1054 (D.P.R. 1971); 9 Moore's Federal Practice (2d ed.) § 203.11, at 736-39. Otherwise, a litigant could temporarily deprive a court of jurisdiction at any and every critical juncture. The November 30 civil contempt order was obviously a nonappealable interlocutory order, *Fox* v. *Capital Co.*, 299 U.S. 105, 107 (1936), and thus the court had jurisdiction to enter the January 14 order. We do not regard the court's entry of "partial default judgment" on that date to have been overly harsh.

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 72-1020.

JAMES D. HODGSON,
Secretary of Labor,
Plaintiff, Appellee,
v.
PAUL J. MAHONEY, d/b/a Mahoney's
Rocky Ledge Farm and Nursery,
Defendant, Appellant.

Before ALDRICH, Chief Judge,
McENTEE and COFFIN, Circuit Judges.

MEMORANDUM AND ORDER
ON PETITION FOR REHEARING

Entered June 22, 1972

The court's comment that the government bears the cost of maintaining the courts to which appellant has responded so indignantly, was simply a response to appellant's complaint that costs were not taxable against the United States without its consent, a fact of life many centuries old.

The petition for rehearing is denied.

By the Court:
DANA H. GALLUP,
Clerk.

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

JAMES D. HODGSON,
Plaintiff,

v. CIVIL ACTION No. 70-1719-G

PAUL J. MAHONEY,
Defendant.

Order on Plaintiff's Motion that Defendant be held in Contempt.

November 30, 1971

GARRITY, J. Upon consideration of plaintiff's motion that the defendant Paul J. Mahoney be held in contempt for refusal to comply with the court's order entered June 25, 1971, and after hearing, it is hereby

ORDERED that defendant Paul J. Mahoney is in contempt of the court's order dated June 25, 1971. The court further orders that the following two sanctions be imposed: (1) plaintiff is awarded the reasonable expenses incurred by plaintiff in obtaining this order, including attorney's fees, and this aspect of the matter is referred to the United States Magistrates for this district pursuant to the court's general order of May 14, 1971; (2) unless defendant complies with the court's order of June 25, 1971 on or before December 6, 1971 defendant Paul J. Mahoney shall pay to the clerk of this court $100 per day for so long as his disobedience of the court's order of June 25 persists. The court specifically reserves the right to impose additional sanctions if required to obtain from the defendant compliance with its order of June 25.

W. ARTHUR GARRITY, JR.,
United States District Judge.

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

JAMES D. HODGSON, Secretary of Labor,
United States Department of Labor,
Plaintiff,
v.

CIVIL ACTION
No. 70-1719-G

PAUL J. MAHONEY d/b/a Mahoney's
Rocky Ledge Farm and Nursery,
Defendant.

Order Imposing Further Sanctions and on Defendant's Application for Stay.

January 14, 1972

GARRITY, J. This case came before the court for hearing on the court's order to show cause dated January 7, 1972 why the defendant should not be penalized further for his continued disobedience of the court's orders entered herein on June 25, 1971 and November 30, 1971 and on defendant's application for a stay of the court's order entered November 30, 1971, notice of appeal having been filed on January 6, 1972, and it appearing that the defendant still has immediate custody and control of the payroll ledger sheets whose production for inspection by plaintiff's counsel the court has repeatedly ordered and that defendant persists in his refusal to produce them, it is ORDERED that the following sanctions be imposed: (1) a permanent injunction shall be entered forthwith against the defendant enjoining Paul J. Mahoney d/b/a Mahoney's Rocky Ledge Farm and Nursery, his agents, servants, employees and attorneys from violating the provisions of Sections 15(a)(2)

and 15(a)(5) of the Fair Labor Standards Act of 1938, 29 U.S.C. § 201; (2) defendant shall deliver forthwith to Assistant United States Attorney Brennan a certified check payable to the Treasurer of the United States in the amount of $3,800; (3) defendant Paul J. Mahoney be committed to the custody of the Attorney General of the United States and confined until the defendant's payroll ledger sheets for the period from July 12, 1968 to July 12, 1970 have been produced.

Defendant's application for stay of the court's order entered November 30, 1971 is denied, except that execution of sanctions (2) and (3) imposed in the previous paragraph of this order is stayed until January 24, 1972.

W. ARTHUR GARRITY, JR.,
United States District Judge.

DISTRICT OF MASSACHUSETTS

JAMES D. HODGSON, Secretary of Labor,
United States Department of Labor,
Plaintiff,
v.

CIVIL ACTION
FILE No.
70-1719-G

PAUL J. MAHONEY, d/b/a Mahoney's
Rocky Ledge Farm and Nursery,
Defendant.

Partial Judgment.

Plaintiff has filed his Complaint and the defendant has appeared by counsel, filed answer to the Complaint, and having failed to comply with the Order of the Court to answer interrogatories, it is therefore:

ORDERED, ADJUDGED, AND DECREED that defendant, his agents, servants, employees, and all persons acting or claiming to act in his behalf and interest, be and they hereby are, permanently enjoined and restrained from violating the provisions of sections 15(a)(2) and 15(a)(5) of the Fair Labor Standards Act of 1938 as amended (52 Stat. 1060, 29 U.S.C. 201), hereinafter referred to as the Act, in any of the following manners:

(1) The defendant shall not, contrary to section 6 of the Act, pay to any of his employees, employed at 242 Cambridge Street, Winchester, Massachusetts, or elsewhere, in an enterprise engaged in commerce and in the production of goods for commerce, as defined by the Act, wages at rates less than the applicable minimum wage.

(2) The defendant shall not, contrary to section 7 of the Act, employ any of his employees, employed at 242 Cambridge Street, Winchester, Massachusetts, or elsewhere, in an enterprise engaged in commerce and in the production

of goods for commerce, as defined by the Act, for a work-week longer than forty (40) hours, unless the employee receives compensation for his employment in excess of forty (40) hours at a rate not less than one and one-half times the regular rate at which he is employed, or at any rate which may in the future be prescribed under section 7 of the Act.

(3) The defendant shall not fail to make, keep, and preserve records of his employees, employed at 242 Cambridge Street, Winchester, Massachusetts, or elsewhere, and of the wages, hours, and other conditions and practices of employment maintained by him, as prescribed by the regulations of the Administrator of the Wage and Hour Division, United States Department of Labor, issued, and from time to time amended, pursuant to section 11(c) of the Act, and found in 29 CFR 516.

Dated January 14, 1972.

W. ARTHUR GARRITY, JR.,
United States District Judge.

Federal Rules of Civil Procedure.

Rule 33(c) Option to produce business records. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is sufficient answer to such an interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or in-

spect such records and to make copies, compilations, abstracts or summaries. As amended Mar. 30, 1970, effective July 1, 1970.

Rule 37. Failure to Make Discovery: Sanctions

(a) Motion for Order Compelling Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) Appropriate court. An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken.

(2) Motion. If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protection order as it would have been empowered to make on a motion made pursuant to Rule 26(c).

. . . . . .

(b) Failure to Comply with Order.

(1) Sanctions by court in district where the deposition is taken. If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) Sanctions by court in which action is pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A),

(B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

. . . . . .

(f) Expenses against United States. Except to the extent permitted by statute, expenses and fees may not be awarded against the United States under this rule.

As amended Mar. 30, 1970, eff. July 1, 1970.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-473

PAUL J. MAHONEY, PETITIONER

v.

JAMES D. HODGSON, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the court of appeals (Pet. App. 13–16) is reported at 460 F. 2d 326. The contempt orders and partial judgment of the district court (Pet. App. 19–24) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 5, 1972. A timely petition for rehearing was denied on June 22, 1972 (Pet. App. 17). The petition for a writ of certiorari was filed on September 20, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

488-369—72

QUESTIONS PRESENTED

1. Whether the district court properly entered a partial default judgment against petitioner after he willfully and persistently refused to comply with the court's discovery order.

2. Whether petitioner's attempt to appeal from a civil contempt order divested the district court of jurisdiction to impose additional remedies for petitioner's continued failure to comply with the court's prior orders.

3. Whether the district court's imposition of remedies for civil contempt was procedurally defective.

4. Whether the district court properly awarded attorney's fees to the Secretary under Rule 37(b)(2)(E), Fed. R. Civ. P.

STATUTES INVOLVED

. The pertinent provisions of the Federal Rules of Civil Procedure are set forth in the petition (Pet. App. 24–27).

STATEMENT

The Secretary of Labor brought this action under Section 17 of the Fair Labor Standards Act of 1938 (29 U.S.C. 217) to enjoin petitioner from violating the Act's minimum wage, overtime, and record keeping provisions, and from continuing to withhold unpaid wages due his employees (A. 5–6).[1] Petitioner refused to answer interrogatories requesting information from payroll and related business records, and filed interrogatories himself to which the Secretary objected.

[1] "A." references are to the appendix filed in the court of appeals.

Petitioner thereupon moved to compel the Secretary to answer. On June 25, 1971, the district court sustained the Secretary's objections, and ordered petitioner either to answer the interrogatories or to permit review of the relevant business records pursuant to Rule 33(c), Fed. R. Civ. P. (A. 23). Petitioner did not comply. Consequently, after a hearing in which petitioner was represented by counsel, the district court on November 30, 1971, held petitioner in contempt of the June 25 order, awarded expenses and attorney's fees to the Secretary, and fined petitioner $100 for each day after December 6 that he remained in contempt.

Petitioner still refused to produce the records, and on January 6, 1972, filed a notice of appeal from the November 30 order and requested a stay pending appeal. A further hearing was held on January 14, 1972, the stay was denied, and the court: (1) entered a partial default judgment against petitioner, enjoining further violations of the Fair Labor Standards Act;[1] (2) fined petitioner $3,800 for his contempt to date; and (3) ordered petitioner incarcerated "until such time as he arranges * * * for the delivery * * * of [those] records, which are within his immediate custody and control, which can be readily produced, and which he through his lawyer has contemptuously refused to produce despite repeated orders, both formal and informal, by the Court" (A. 92). The court stayed the execution of the fine and

[1] The court declined to restrain the continued withholding of unpaid wages, since the wages due could not be ascertained without the records in issue (A. 91-92).

commitment for ten days. Petitioner filed a second notice of appeal, and applied to the court of appeals for a stay of the November 30 and January 14 orders pending final disposition of the appeals (A. 3). When the stay was denied on January 21, 1972, petitioner paid the fine and produced the records.

The court of appeals affirmed *per curiam*. It held that the June 25 discovery order was authorized by Rule 37(a), Fed. R. Civ. P., was not unduly burdensome, and did not violate petitioner's privilege against self incrimination. The court rejected petitioner's contention that the November 30 order was procedurally defective, pointing out that petitioner had notice and was heard through his attorney. It held that the award of attorney's fees violated no constitutional right of petitioner. Finally, the court held that petitioner's attempt to appeal from the November 30 civil contempt order, "obviously a nonappealable interlocutory order" (Pet. App. 16), did not divest the district court of jurisdiction to enter the January 14 order, and that the partial default judgment was not overly harsh (Pet. App. 13–16).

ARGUMENT

Petitioner urges in this Court that the orders of the district court adjudging him in contempt, entering a default judgment against him, and ordering his incarceration violated due process, that the district court was without jurisdiction to enter the January 14 order after an appeal from its November 30 order had been filed, and that the award of attorney's fees to the government deprives him of property without due process

because such costs cannot be assessed against the government. These contentions were considered and rejected by the court below, in an opinion on which we rely. Contrary to petitioner's assertions, there is no conflict among the circuits on any of the questions presented. Further review by this Court is not warranted.

1. Petitioner's contention that the trial court's entry of a partial default judgment violates due process and conflicts with numerous decisions of the Fifth and Second Circuits is without merit. In the decisions cited by petitioner, the person to whom the discovery order was directed was unable to comply (Pet. 5–6). It is well settled, however, that the sanctions provided by Rule 37(b)(2)(C), Fed. R. Civ. P., including the entry of a default judgment, should be imposed where, as here, the information sought is readily available and the party has repeatedly refused to produce it. See, *e.g.*, *Hammond Packing Company* v. *Arkansas*, 212 U.S. 322, 347, 351–352; *Jones* v. *Uris Sales Corp.*, 373 F. 2d 644 (C.A. 2); *Diaz* v. *Southern Drilling Corp.*, 427 F. 2d 1118, 1126–1127 (C.A. 5), certiorari denied *sub nom. Trefina* v. *United States*, 400 U.S. 878.

Moreover, the default judgment here was limited to an injunction against future violations, which, as was pointed out in *Mitchell* v. *Pidcock*, 299 F. 2d 281, 287 (C.A. 5), "subjects the [petitioner] to no penalty, to no hardship," but "requires the [petitioner] to do what the Act requires anyway—to comply with the law."

2. The court below correctly held that petitioner's attempt to appeal the first contempt order did not divest the district court of jurisdiction to impose additional sanctions for failure to comply with its orders. It is clear that the November 30 order imposed remedies for civil contempt, and was therefore not an appealable final judgment.[3] *Fox* v. *Capital Co.*, 299 U.S. 105, 107. See also *Fireman's Fund Insurance Co.* v. *Myers*, 439 F.2d 834, 837–838 (C.A. 3).

The attempted appeal, therefore, was correctly disregarded by the district court. *Ruby* v. *Secretary of the United States Navy*, 365 F.2d 385, 389 (C.A. 9), certiorari denied, 386 U.S. 1011. The cases cited by petitioner do not indicate that there is a conflict among the circuits on this issue. In *United States* v. *Hemphill*, 369 F.2d 539 (C.A. 4), the very fact that "the contempt citation itself is not an appealable order" (*id.* at 543) led the court to conclude that mandamus would lie when the underlying order is clearly erroneous. The court carefully noted, however, that mandamus is not available when the underlying order is within the range of the discretion vested in the district judge (*id.* at 544, n. 7). *Keohane* v. *Swarco, Inc.*, 320 F.2d 429 (C.A. 6), involved an apparently premature appeal, followed by the district court's dismissal of a motion to amend. The court of appeals

[3] Petitioner incorrectly suggests that the imposition of a fine rendered the November 30 order one for criminal contempt (Pet. 6–7). The fine, however, could have been entirely avoided by reasonably prompt compliance even at that date; it was thus "intended to be remedial by coercing [petitioner] to do what he had refused to do" (*Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 442).

held, however, that it had jurisdiction of the appeal, and that the district court's dismissal was therefore invalid under the general principle that an effective appeal divests the lower court of jurisdiction. Finally, the Fifth and Seventh Circuit cases cited by petitioner do not indicate that those courts would reach a different result from that of the court below.[4]

3. Petitioner's due process objections concerning the entry of the orders of June 25 and November 30 are also unfounded. Although the trial court's original discovery order was not initiated by the Secretary's filing of a formal written motion under Rule 37(a), Fed. R. Civ. P., petitioner had filed such a motion and both parties, as pointed out by the court below, had "call[ed] on the court for assistance" (Pet. App. 15). In these circumstances the requirements of notice were clearly met. Nor was the order defective because the Secretary did not file a motion to produce under Rule 34 (Pet. 10); the court's order providing that petitioner could produce his payroll records in lieu of answering the Secretary's interrogatories was added only to accommodate petitioner's claim that the interrogatories were burdensome. Finally, although,

[4] In *Turner* v. *HMH Publishing Co.*, 328 F.2d 136 (C.A. 5), the defendants filed simultaneously a motion to amend the judgment and a notice of appeal. The district court did not lose jurisdiction. *In re Federal Facilities Realty Trust*, 227 F.2d 651 (C.A. 7), involved a properly filed appeal, and held only that once a case is before the court of appeals, the district court has no jurisdiction to vacate a stay. In *Elgen Manufacturing Corporation* v. *Ventfabrics, Inc.*, 314 F.2d 440 (C.A. 7), a proper appeal was taken, but the court nevertheless concluded that the district court thereafter retained jurisdiction to consider a timely motion to amend the findings of fact.

due to a typographical error, the Secretary's motion for sanctions referred to Rule 37(b)(1) (which deals with depositions and thus is obviously not relevant), the Secretary's brief in support of the motion correctly referred to Rule 37(b)(2) (see A. 47–48). Petitioner's attorney appeared at the hearing and opposed the motion. The typographical error, therefore, was not prejudicial.

4. Petitioner's contention that an award of attorney's fees to the government violates due process is unsubstantiated by any judicial precedent. There is no constitutional requirement that all litigants in civil suits be afforded the same treatment in the matter of attorney's fees or other costs.[5] The rationale for not requiring the government to pay costs and fees is "the practical consideration that, since public moneys cannot be paid out except upon an appropriation by Congress, the Courts will not enter against the government a judgment for costs which would require the payment of moneys from the public treasury, unless they are expressly authorized by Congress to do so * * *" (*Walling* v. *Norfolk Southern Ry. Co.*, 162 F.2d 95, 96 (C.A. 4)).

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[5] For example, in Section 16(b) actions under the Fair Labor Standards Act, employees who prevail are entitled to and must be awarded reasonable attorneys' fees (*Wright* v. *Carrigg*, 275 F.2d 448 (C.A. 4)) whereas employers in such actions have to pay their own attorney fees whether successful or not.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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